the Commission for leave to file petitions for reconsideration, on the general ground that they were entitled to broader authority than had been granted by the Commission. Each of those petitions was determined on its particular facts. Where the Commission concluded that the applicant was entitled to broader authority, the petition was granted and the Commission's prior decision reconsidered in light of the *Shaw* decision.[1] In other cases the Commission concluded that the *Shaw* decision did not warrant any different result in the scope of an applicant's grandfather authority, and the petitions were denied.[2] That was the course followed here and we submit it comported with the *Shaw* decision.

In *Shaw,* this Court reaffirmed that Section 7(c) contemplates the issuance of a certificate which will maintain a "substantial parity between future operations and prior *bona fide* operations" (*United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 475, 481) and that the extent of the carrier's *bona fide* operations is measured by "the standard of substanti-

[1] *E.g., Albany Food Products, Inc., "Grandfather" Application,* 98 M.C.C. 618, sustained *sub nom. Exley Express, Inc. v. United States,* Civil Action No. 65-427, D. Ore. (June 27, 1966), appeal pending, No. 644, O.T., 1966; *Colonial Refrigerated Transport, Inc. "Grandfather" Application,* MC-115841 (Sub-No. 48); sustained *sub nom. Colonial Refrigerated Transportation, Inc.* v. *United States,* 255 F. Supp. 999 (N.D. Ala.), notice of appeal filed.

[2] *E.g., Coast Refrigerated Transport Co., Contract Carrier "Grandfather" Application,* MC-117421 (Sub-No. 1), August 6, 1964; *Exley Express, Inc., Common Carrier "Grandfather" Application,* MC-114290 (Sub-No. 2), March 21, 1966.

ality of service" (*ibid.*). The Court added that this determination necessarily involves a judgment on such matters as the applicant's "status and performance as a common carrier, the transportation characteristics and marketing pattern of these seasonal agricultural products, and the demonstrated ability of [the applicant] to perform the services" (377 U.S. at 160).

The authority granted appellants by the Commission achieves substantial parity with their prior *bona fide* operations. In contrast to the cases they cite (J.S. 10–11, 15), appellants had commenced operations only a short time before the "grandfather" date (May 1, 1958), and during the critical period they had conducted only a limited, point-to-point operation. Despite the fact that they were serving one of the major producing areas for these frozen commodities (Oregon, Washington, and California), by the time of the "grandfather" date they had transported only 5 shipments of frozen fruits, 16 of frozen vegetables, and 23 of frozen berries (84 M.C.C. at 457–458). The Commission's conclusion that such operations failed to justify broad, area-wide authority was entirely reasonable; "[w]hile service to and from all points in the States included in the application was not allowed, the reduction was determined by the standard of substantiality of service" (*Carolina Freight Carriers, supra,* at 481). The limited number and unrelated character of their shipments of the commodities in question also support the Commission's factual determination that in this case these commodities should not be treated as one class of property.

Thus, whatever the precise scope of an individu
carrier's "grandfather" rights under Section 7(c)—
subject of continuing litigation [3]—the decision belo
we submit, turns on its particular facts and is corre

CONCLUSION

The judgment of the district court should
affirmed.

Respectfully submitted.

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OCTOBER 1966.

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[3] Since this Court's decision in *Shaw*, five Section 7(c) cas
have been filed in the district courts. In two such cases t
Commission decision has been sustained (*Colonial Refrigerat
Transport, Inc.* v. *United States*, *supra*, n. 1; and *Exley E
press, Inc.* v. *United States*, *supra*, n. 1); in one case the Co
mission's decision was reversed (*Willis Shaw Frozen Expre
Inc.* v. *United States*, Civil Action No. 1918, W. D. Ark., M
31, 1966); and two cases are still pending (*Lester C. Newt
Trucking Co.* v. *United States*, Civil Action No. 2508, D. De
Winter Garden Co. v. *United States*, Civil Action No. 545
E.D. Tenn.).

APPENDIX

Section 7(c) of the Transportation Act of 1958 (72 Stat. 573, Historical Note following 49 U.S.C. 303), provides in pertinent part:

> Subject to the provisions of section 210 of the Interstate Commerce Act [section 310 of this title], if any person (or its predecessor in interest) was in bona fide operation on May 1, 1958, over any route or routes or within any territory, in the transportation of property for compensation by motor vehicle made subject to the provisions of part II of that Act [this chapter] by paragraph (a) of this section [amending subsec. (b)(6) of this section], in interstate or foreign commerce, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on May 1, 1958, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant or its predecessor in interest had no control, the Interstate Commerce Commission shall without further proceedings issue a certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if application is made to the said Commission as provided in part II of the Interstate Commerce Act [this chapter] and within one hundred and twenty days after the date on which this section takes effect [August 12, 1958]. Pending the determination of any such application, the continuance of such operation without a certificate or permit shall be lawful. Any carrier which on the date this section takes

effect [August 12, 1958] is engaged in an operation of the character specified in the foregoing provisions of this paragraph, but was not engaged in such operation on May 1, 1958, may under such regulations as the Interstate Commerce Commission shall prescribe, if application for a certificate or permit is made to the said Commission within one hundred and twenty days after the date on which this section takes effect [August 12, 1958], continue such operation without a certificate or permit pending the determination of such application in accordance with the provisions of part II of the Interstate Commerce Act [this chapter].

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 564

FRANK P. BATTAGLIA and THOMAS TORCHIA,
a partnership doing business as
PRODUCE TRANSPORT DISPATCH,

Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

On Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLANTS OPPOSING MOTIONS TO AFFIRM

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